No. A19-0665

State of Minnesota

In Court of Appeals

Michelle L. MacDonald, MacDonald law Firm, LLC,
Appellants,

v.

Michael Brodkorb, individually and doing business as www.MissinginMinnesota.com, Missing in Minnesota, LLC, and John and Mary Does,
Respondents.

RESPONDENTS' BRIEF

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(1) This issue was not raised in the trial court.

(2) The court ruled that no genuine issues of fact remained for trial on Plaintiff/Appellants' defamation complaint.

(3) This issue was not preserved for appeal.

(4) Most apposite authorities:

Thiele v. Stich, 475 N.W.2d 580, 582 (Minn. 1988)
2 Herr & Haydock, Minnesota Practice, Rule 56.01, §56.12
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II. WAS IT A DENIAL OF DUE PROCESS TO DISMISS THE CASE ON SUMMARY JUDGMENT WITHOUT AN ANSWER AND DISCOVERY?

(1) This issue was not raised below.

(2) The court ruled on the motion for summary judgment on May 1, 2019. At no time between September 19, 2018 and the hearing on November 1, 2018 (or thereafter) did Plaintiff/Appellants seek a continuance to conduct discovery.

(3) This issue was not preserved for appeal.

(4) Most apposite authorities:

Sawh v. City of Lino Lakes, 823 N.W.2d 627 (Minn. 20112)
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(1) This issue was not raised below.

(2) The court ruled that there were no genuine issues as to whether Plaintiff was a public figure and whether Defendant acted with actual malice, leaving no basis for a defamation by implication claim.

(3) This issue was not preserved for appeal.

(4) Most apposite authority:

Diesen v. Hessburg, 455 N.W. 2d 446 (Minn. 1990)
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STATEMENT OF THE CASE

Appellants [hereinafter referred to as "MacDonald"] filed identical defamation Complaints against Respondents [hereinafter referred to as "Brodkorb"] in Dakota and Ramsey Counties on June 15 and 18, 2018. [Order filed 3/1/2019, App. Add. A.3]. Brodkorb moved n both counties for Rule 11 sanctions and dismissal. [*Id.*, A.3-4]. On August 17, 2018, the Dakota County case was dismissed without prejudice. Id. On July 24, 2018, MacDonald filed an Amended Complaint in Ramsey County (Index #12).

On September 18, 2018, MacDonald filed a motion for a default judgment, asserting that Brodkorb had failed to answer her 2 complaints. [Index #17, App. Add. A.65]. On September 19, 2018, Brodkorb filed a Motion to Dismiss Pursuant to Minn. R. Civ. P. 12 and/or for Summary Judgment pursuant to Minn. R. Civ. P. 56. [Index No.18, App. Add., A.69]. In support of the motion, Brodkorb filed an affidavit with exhibits and a memorandum of law. [Index #s 19, 20-22]. MacDonald filed an "affidavit" (Index #24) which simply repeated the allegations of her amended complaint without specifically responding to Brodkorb's affidavit. MacDonald's "affidavit" was not notarized and not signed under penalty of perjury..

Both motions then came on for hearing before the Hon. Richard H. Kyle, Jr., on November 1, 2018, after which Judge Kyle took the motions under advisement. [Index #28]. On May 1, 2019, Judge Kyle issued his Order, denying MacDonald's Motion for Default Judgment, and granting Brodkorb's motion for summary judgment. [Index #33; App. Add.

A.1].

STATEMENT OF FACTS

Appellant's Brief asserts (p.5) that the facts set forth in its complaints, are voluminous compared with the single affidavit submitted by Brodkorb. Brodkorb's affidavit and exhibits, however, are the only evidentiary facts in admissible form in this record. The general allegations and conclusory statements in MacDonald's unverified complaints and her unnotarized affidavit are not established facts on this record. MacDonald submitted an unnotarized affidavit that parroted the allegations of her complaint, but did not address the specific facts presented by the Brodkorb affidavit. At no time did MacDonald suggest that she needed discovery to respond to the summary judgment motion or that she had a due process right to have the litigation continue before the summary judgment motion should be decided.

On April 5, 2013, at 11:28 p.m., Ms. MacDonald was observed speeding and weaving on the roadway. [*MacDonald Shimota v. Comm'r of Pub. Safety*, 2015 WL 1959669, No. 14-0618 (Minn. App. 05-04-2015) [unpublished], Exhibit "D" to Brodkorb Aff., Brodkorb Aff., ¶13, A.75]. Upon stopping her vehicle, the officer detected the odor of alcohol and asked Ms. MacDonald to get out of the car for field sobriety tests. She refused to cooperate, and had to be forcibly removed from the car and was arrested for driving while impaired and careless driving. At the station, she refused to cooperate with a breath test, and she was

charged with test refusal. [*Id*.] In September of 2014, MacDonald was found not guilty of drunk driving, but was found guilty of refusing to submit to breath testing, obstructing legal process and speeding. [*Id*.]. On May 4, 2015, the Minnesota Court of Appeals upheld the revocation of her diver's license arising out of the 2013 stop. The court upheld the district court's conclusion that the officers had probable cause to believe that MacDonald was driving impaired, considering her speeding, weaving, the odor of alcohol, and her irrational responses to the officers' requests.

Beginning on January 8, 2013, Macdonald represented (as the fourth attorney on the case) Sandra Grazzini-Rucki in a Dakota County child custody case. [Brodkorb Aff., ¶5, App. Add. A.72]. On April 19, 2013, Grazzini-Rucki defied the Court's custody orders and secreted two daughters. They remained secreted for nearly three years (944 days). [*Id*., ¶5, A.73] until November of 2015. Subsequently Grazzini-Rucki and three co-conspirators were convicted of multiple felony counts of deprivation of parental rights. [*Id*., ¶6].

MacDonald's conduct during this proceeding was confrontational, involving an unfounded motion, unwarranted subpoenas, and disruptive conduct at court hearings. *In re Petition for Disciplinary Action against Michelle Lowney Macdonald*, 906 N.W.2d 238 (Minn. 2018). On September 11, 2013, the day before trial, MacDonald filed a suit in federal court against the judge for the apparent purpose of causing a mistrial or to support an appeal. *Id*. The federal case was dismissed as futile and unsupported by anything in the record..

MacDonald admitted she was unprepared to proceed at trial, calling only one witness,

referring to the trial as a "pretend trial" and repeatedly interrupting the judge. [*Id*.] Before the second day of the trial, MacDonald accused the court reporter of inaccurately recording testimony and began taking pictures of the courtroom to "accurately record the events at trial." Court deputies reminded her that she knew that pictures could not be taken in the courtroom. When they subsequently sought to prepare a citation for contempt, she refused to cooperate, leading to her being placed in custody, where she was issued citations for contempt and obstruction of legal process. When it came time to return to the courtroom, she refused to stand up or walk on her own. The deputies placed her in a wheelchair and returned her to the courtroom.[1] When the judge reminded her of her duty to her client and asked how she wanted to proceed, she refused to respond. Based on this and other conduct, the Minnesota Supreme Court upheld a 60 day suspension of her license to practice law, followed by 2 years of probation.

MacDonald's amended complaint (¶40) alleges that she first had contact with Brodkorb after she was endorsed by the Republican Party of Minnesota to run for the Minnesota Supreme Court in July of 2014. She at that time provided him with some information, for the apparent purpose of defusing the effect of the foregoing matters. Brodkorb did not accept all of MacDonald's assertions about these events, but proceeded to investigate the events. [Brodkorb Aff., ¶3, App. Add. A72].

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[1]MacDonald brought a federal action against the deputies, alleging 22 counts of constitutional and state law claims, all of which were dismissed, on the pleadings, *Shimota v. Wegner*, 2016 WL 1254240, no. 15-1590 (D. Minn. 03-29-2016) and on summary judgment, *Shimota v. Wegner*, 2017 WL 4083145 (D. Minn. 09-14-2017).

In the course of his investigations, Brodkorb contacted the Lakeville police department and he was informed on multiple occasions that MacDonald was a "person of interest" in their criminal investigation of the Grazzini-Rucki matter. [*Id.*, ¶7; A.73]. This was supported by MacDonald's strange behavior at the trial, and by other news reports. [*Id*., ¶4; A.72]. He investigated her disciplinary complaint and discovered that her claims about mistreatment were substantially contradicted by the findings of the disciplinary board. *Id*., ¶2, A. 71-72]. His investigation of her claims about her contempt citation led to discovery (in the county jail's booking database) of a photo taken of her when she was in custody. [*Id*., ¶11, A.74]. Investigation of her arrest and conviction led to the conclusion that her tales of mistreatment were false and that she was in fact convicted of refusing to take the breath test, obstructing legal process and speeding. [*Id*., ¶13, A.75].

MacDonald was, at all relevant times herein, a candidate for public office. After losing in 2014, she immediately announced her intention to run again in 2016, and she followed that up with another candidacy in 2018. [Id., ¶13; Amended Complaint, ¶1, 9, 40]. MacDonald did not dispute her perpetual candidacy during the time period addressed in the Complaint.

STANDARD OF REVIEW

This court reviews the grant or denial of a motion for default judgment on an abuse of discretion standard. *Black v. Rimmer*, 700 N.W.2d 521, (Minn. App. 2005). Summary judgment is appropriate when there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. This court reviews *de novo* a district court's summary judgment decision. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). This court reviews *de novo* the procedural due process afforded a party. *Zellman v. Ind. Sch. Dist.*, 594 N.W.2d 216, 220 (Minn. App. 1999), review denied (Minn. July 28, 1999).

ARGUMENT

I. THE APPEAL MUST BE DISMISSED BECAUSE THE ISSUES IT SEEKS TO LITIGATE WERE NOT RAISED BELOW.

A reviewing court will not consider questions never litigated below and passed on by the trial court. *Thiele v. Stich*, 475 N.W.2d 580, 582 (Minn. 1988). MacDonald's claim on this appeal is that she was denied due process when summary judgment was granted before she had a chance to conduct discovery. The record is devoid if any such claim. MacDonald did not request a chance to conduct discovery as permitted by Rule 56.04. MacDonald did

not request that the motion be continued. MacDonald did not claim a due process right to denial of the summary judgment motion. Because these issues were not raised or litigated below, they are not subject to review on this appeal.

II. THE DISTRICT COURT'S DENIAL OF THE MOTION FOR DEFAULT JUDGMENT WAS NOT IN ERROR.

Appellant's Brief (p.12) does not dispute the propriety of the court's denial of the motion for a default judgment. Instead, it argues that the court was obligated to "require an answer so that discovery and the litigation could proceed." However, the court had pending before it a motion for summary judgment whish, if granted, would put an end to the litigation. A defendant is not required to file an answer before moving for summary judgment. 2 Herr & Haydock, MINNESOTA PRACTICE: CIVIL RULES ANNOTATED, Rule 56.01, §56.12 (6th ed. 2019). MacDonald, who was afforded a full and fair opportunity to defend against summary judgment, failed to specifically respond to Brodkorb's evidence on summary judgment and failed to seek discovery.

Rule 56.02 requires that a motion for summary judgment must be served at least 14 days before the hearing and it sets an outside limit requiring that the motion may not (without court order) file a motion for summary judgment more than 30 days after the close of discovery. The Rule "does not contain an early limit before which a summary judgment may not be brought. As a practical matter, however, an early motion for summary judgment is

likely to be continued to allow any opposing party to gather the evidence needed to respond." [emphasis added]. 2 Herr & Heydock, supra, Rule 56.02, §56.15 (6th ed. 2019). MacDonald was permitted by Rule 56.04 to move for a continuance to conduct discovery or any other order if she felt she could not present facts needed for her opposition to the motion. No such request was made.

In support of the claim that the court should have required an answer, Appellant's Brief (p. 12) cites to Minn. R. Civ. P. 55.01 (a)-(b) and *Doe v. Legacy Broadcasting of Minnesota, Inc*., 504 N.W.2d 527, 528 (Minn. App. 1993). Rule 55.01(a) applies only to claims upon a contract for money only. Rule 55.01(b) states that in all other cases, the plaintiff must apply to the court for a default judgment. *Doe* holds that a party is not entitled to a default judgment where it accepts a late answer without objection. None of the authorities cited in Appellant's Brief even remotely suggest that the district court was required to allow the litigation to continue under the circumstances presented herein.

Appellant's Brief's criticism of the court's citation to cases involving relief from default judgments (15-17) does not advance its argument. These cases have nothing to do with whether the district court abused its discretion by not requiring an answer when the case was subject to dismissal on the pending summary judgment motion. Moreover, *Black v. Rimmer*, supra, a case cited by Appellant for the proper standard of review, notes, in a case where the defendant did not appear or otherwise defend:

> [A] district court should deny a motion for default judgment "when four requirements are met: defendant has a reasonable defense on the merits;

> defendant has a reasonable excuse for his failure to answer; defendant acted with due diligence after notice of the entry of judgment; and no substantial prejudice will result to other parties." *Coller*, 294 N.W.2d at 715. As we will note *infra*, these are the same factors a district court should consider when deciding whether to vacate a judgment under Minn. R. Civ. P. 60.02. *Guillaume & Assocs. v. Don-John Co.*, 371 N.W.2d 15, 18 (Minn.App.1985). Thus, our analysis of the four factors that we make in reviewing the district court's granting of the default judgments will be the same analysis that we will make in reviewing the court's denial of Rimmer's motion to vacate those judgments.

Finally, Appellant's Brief argues (p. 18) that the allegations of the complaint established a *prima facie* case so that due process required the district court to allow the litigation to continue. No authority is presented to support that claim. Indeed, Rule 56.01 dictates the contrary: "The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgement as a matter of law" [emphasis added].

III. THERE IS NO BASIS FOR A CLAIM THAT DUE PROCESS WAS DENIED.

Appellant's Brief (p.18 et seq) argues in its Issue II that the district court violated due process when it granted summary judgment. The Brief (p.19-20) first cites to general authority regarding summary judgment, without applying any of this authority to the case at hand. The Brief then asserts (p. 20):

> The court's decision to simultaneously "reopen" a default judgment, and dismiss by a summary judgment failed to satisfied [sic] the constitutional opportunity to be heard on appellants' defamation claim.

The district court did not purport to "reopen" a default judgment. It simply denied MacDonald's motion for a default judgment and proceeded to consider the pending summary judgment motion. MacDonald's claim (Appellant's Brief, p. 21-22) is that she needed "an opportunity to conduct discovery to gather the evidence to bring or defend a summary judgment dismissal." To the contrary, MacDonald had an opportunity to conduct discovery pursuant to Rule 56.04, but she declined to take advantage of that opportunity.

The Minnesota and Federal Constitutions prohibit the government from depriving a person of "life, liberty, or property, without due process of law." U.S. Const. Amend. V, XIV; Minn. Const., art. I, §7. Appellant's Brief claims that the rules, as applied by the district court, did not afford her an opportunity to be heard at a meaningful time and in a meaningful manner. See *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). Before procedural due process mandates a meaningful hearing, the plaintiff must establish a governmental deprivation of a constitutionally protected liberty or property interest. In the absence of such an interest, a right to due process does not accrue. *Id.*; *Nexus v. Swift*, 785 N.W.2d 771, 779 (Minn. App. 2010), abrogated on other grounds, *Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 230-32 (Minn. 2014).

Appellant's Brief does not claim that she was deprived of a constitutionally-protected liberty or a property interest. The reputational interest in a defamation claim is not a protected liberty interest. *Paul v. Davis*, 424 U.S. 693, 711-12, 96 S.ct. 1155, 1165-66, 47 L.Ed.2d 405 (1976); *Nexus v. Swift*, *supra*, 785 N.W.2d at 779. Appellant's Brief makes no

claim that Brodkorb deprived her of due process.

The summary judgment procedure under Minnesota law serves a substantial government interest in providing for the disposition of cases when no genuine fact issues justify their continuation. The rules provide significant protections against the risk of erroneous deprivation of protected interests (the right to pre-deprivation hearing, the right to present evidence, the right to request a continuance or other relief). The nature of the interest in question (plaintiff's right to pursue her defamation claim when there are genuine issues of fact) does not rise to the level of constitutional protection. MacDonald received a meaningful hearing. *Sawh*, *supra*, 823 N.W.2d at 633-634.

MacDonald cannot complain on this appeal that she was entitled to discovery because she failed to assert that claim before the district court. Procedural due process requires no more than reasonable notice and a meaningful opportunity to be heard. *Sawh, supra,* 823 N.W.2d at 633-34. MacDonald makes no claim that she was not properly notified of the motion for summary judgment on September 19, 2018. She makes no claim that she did not have an opportunity to respond to Brodkorb's motion allegations prior to hearing on November 1, 2018. She does not claim that she did not have an opportunity to be heard at that hearing.

Appellant's Brief asserts (p. 23) that, "in its decision, the court disregards the facts in the verified Complaint demonstrating Respondents were defamatory as to Appellants." In fact, the Complaint was not verified and MacDonald failed to present any specific admissible

evidence to contradict the evidence presented by Brodkorb.

Appellant's Brief claims (p. 30) that the court erroneously determined that the amended complaint alleged only three defamatory statements, but it fails to identify any other specific factual claims of defamatory statements. The Brief further asserts (p.32) that, "[d]efendants never admitted or denied any of the facts as alleged in the complaint or the existence of any of the elements of defamation." In fact, Brodkorb"s affidavit [¶2-13] specifically denies that he made the allegedly false statements asserted in the Complaint. The existence of false statements is an essential element of a defamation claim. Moreover, Brodkorb's affidavit shows that MacDonald was a public figure and that Brodkorb's statements were not made with malice. As a public figure, proof of actual malice is an essential element of her claim. *Foley v. WCCO Television, Inc*., 449 N.W.2d, 503 (Minn. App. 1989), *review denied*, (Minn. Feb. 9, 1990).

Public Figure. Appellant's Brief claims (p. 34) that MacDonald had no opportunity to respond to the allegation that she was a public figure because the court "sua sponte" determined that she was a public figure. To the contrary, Brodkorb's memorandum of law in support of his motion contains a section: "THERE ARE NO GENUINE FACT ISSUES PRECLUDING JUDGMENT FOR DEFENDANT ON THE ISSUE OF WHETHER PLAINTIFF IS A PUBLIC FIGURE." Citing to *Klaus*, *supra* and *Molitor*, *supra* for the proposition that a candidate for public office is to be treated like a public official for defamation purposes. The Memorandum notes that "Plaintiff has been a perennial candidate

for office, running for Minnesota Supreme Court Justice in 2014, 2016, and 2018. [Mem. P. 9-10]. The memorandum [Index #19, p. 6] specified that an undisputed fact was that:

> Plaintiff was, at all relevant times, a public figure as a candidate for public office and a person who thrust herself into public controversy.

MacDonald had full opportunity to reply to these facts and the legal issues they present, but she declined to do so.

Appellant's Brief (p. 34-36) claims that, as a mere candidate for public office, she should not be treated like a public official or classified as a public figure. She distinguishes *Klaus v. Minn. State. Ethics Comm'n*., 309 Minn. 430, 244 N.W.2d 672, 676 (Minn. 1976), on the ground that it was not a defamation case. *Klaus* was a case where a candidate for public office challenged the constitutionality of certain disclosure provisions in Minnesota's Ethics in Government statute. In determining that the candidate was a "public figure," the Court quoted a Wisconsin case holding that judges were subject to Wisconsin's similar disclosure law [*In re Kading*, 70 Wis.2d 508, 525, 235 N.W.2d 409, 417 (1975)]:

> Judge Kading is by voluntary choice a public official. While public officials, of course, do not waive their constitutional rights, they are nevertheless set apart from other members of society in terms of certain rights, as the law on libel makes clear. One who willingly puts himself forward into the public arena, and accepts publicly conferred benefits after election to public office, is legitimately much more subject to reasonable scrutiny and exposure than a purely private individual.

Applying the same defamation rationale, the *Klaus* court concluded that a candidate for public office is also a public figure subject to greater public scrutiny [244 N.W.2d at 676]:

> As other courts have pointed out, one who volunteers himself as a candidate

> for public office becomes thereby a public figure and is subjected to greater scrutiny as he aspires for positions of higher responsibility.

In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971), the Supreme Court explained, in a defamation case:

> [I]t is abundantly clear that ... publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office."

Appellant's Brief criticizes the court's citation to public official cases but it fails to set forth how this is relevant to the issues in this case. Both public officials and public figures must show actual malice to establish defamation. It is undisputed that MacDonald had been a perennial candidate for public office, challenging incumbent justices for seats on the Minnesota Supreme Court in 2014, 2016, and 2018. Because MacDonald was a public figure at the relevant times in this case, actual malice was an essential element of her claim.

Actual Malice. Appellant's Brief makes no argument that it could ultimately meet its burden of proving actual malice. It suggests, instead, that summary judgment was inappropriate because malice involves state of mind. This argument was rejected in *Connelly v. Northwest Publications, Inc*., 448 N.W.2d 901, 903 (Minn. App. 1989). The appropriate summary judgment test is whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence. *Id*. In response to the summary judgment motion, MacDonald was required to come forward with clear and convincing evidence in admissible form sufficient to permit a reasonable jury to find actual malice. *Foley v. WCCO Television, Inc*., 449 N.W.2d 497, 503 (Minn. App.

1989), rev. den. (Minn. Feb. 9, 1990).

Brodkorb's affidavit shows, as to each specific claim of defamatory statements in the complaint, that he investigated the claims and that his reports were either truthful or made without serious doubts as to their truth. His testimony was not contradicted by MacDonald. Accordingly, there is no genuine issue of fact as to actual malice, and the complaint is subject to dismissal on that basis alone. See *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 488 (Minn. 1985).

Drunk Driving. The Brodkorb Affidavit denied the Complaint's claims that he had falsely depicted her as a drunk and he had claimed in a tweet that she was convicted of driving under the influence, and presented specific evidence to refute those claims [¶13-15 A.74-75]:

> 13. The Amended Complaint asserts at various places, that I have falsely depicted her as "a drunk" [see, e.g. ¶¶ 79, 88, 89] and that I stated in a tweet that she had been convicted of driving under the influence.
>
> 14. Plaintiff admits that she was involved in a traffic stop on August 5, 2013. She claims that a blood test taken at some later time that day showed zero alcohol in her system, and that she was "acquitted in September of 2014 of drunk driving." [Amended Complaint, ¶42].

On May 4, 2015, the Minnesota Court of Appeals upheld the revocation of Plaintiff's driver's license for her refusal to take an Intoxilyzer test after being stopped for driving under the influence on April 5, 2013. The Court reviewed the evidence of the stop as follows [Brodkorb Aff., Exh. "D"]:

> At approximately 11:28 p.m. on April 5, 2013, Rosemount Police

Officer Alex Eckstein was on routine patrol and observed a vehicle speeding 38 miles per hour in a posted 30 mile-per-hour zone. Officer Eckstein executed a U-turn and followed the vehicle for a few miles, reaching a top speed of 42 miles per hour. Officer Eckstein observed the vehicle weaving within its own lane and the vehicle's left tires drift left and touch the center line twice. Officer Eckstein activated his emergency lights, initiated a traffic stop of the vehicle, and identified the driver as appellant Michelle MacDonald Shimota.

When Officer Eckstein asked Shimota if she was aware that she was speeding, she replied, "No, I was not, and I'm a reserve cop." Officer Eckstein told Shimota that he detected a slight odor of an alcoholic beverage and asked her how much she had been drinking that evening. Shimota denied consuming any alcohol. Officer Eckstein asked Shimota to exit her vehicle to perform field sobriety tests, and Shimota replied that she was going to go home. Officer Eckstein repeated his request, and Shimota again refused to get out of the vehicle and stated that she would either drive or walk home. Officer Eckstein called for backup.

Rosemount Police Sergeant Brian Burkhalter arrived on the scene to assist. Officer Eckstein repeated the factual basis for his request that Shimota perform field sobriety testing two more times. But Shimota again insisted that she was going to go home and that she was okay to drive. Shimota informed the officers that she was an attorney and a reserve cop, and that she was "not liking this." When Sergeant Burkhalter challenged Shimota about whether she was in fact a reserve cop, she admitted that she had only completed the citizen's academy training. Shimota continued to insist that she had not committed a crime and informed Officer Eckstein that he could give her a speeding ticket.

When Sergeant Burkhalter requested that Shimota step out of the vehicle to complete field sobriety testing, Shimota refused to comply. Despite repeated requests by both officers, Shimota refused to exit her vehicle; the parties came to a standstill. The officers opened the driver's side door of Shimota's vehicle. Sergeant Burkhalter attempted to administer a horizontal gaze nystagmus test while Shimota sat in the driver's seat, but she averted her gaze, making it impossible for him to conduct the test. Sergeant Burkhalter warned Shimota that if she left the scene that she would be placed under arrest for fleeing a police officer. Shimota replied that she could not be arrested because she had to attend a training event in the morning, and she told the officers to give her a speeding ticket. Officer Eckstein, Sergeant Burkhalter,

and another assisting officer forcibly removed Shimota from her vehicle, and arrested her for driving while impaired and careless driving. An officer handcuffed Shimota and placed her in the back of Officer Eckstein's squad car.

The officers transported Shimota to the police department, where Officer Eckstein read her the implied-consent advisory. The officers provided Shimota with a telephone and she made phone calls, but the officers were unaware if she called an attorney. After 34 minutes had elapsed, the officers then asked Shimota to complete a breath test, and she requested to immediately go before a magistrate or judge under Minn. Stat. § 169.91 (2014). Shimota did not provide a breath sample as requested, and when the Intoxilyzer machine timed out without her attempting to provide a breath sample, the police officers advised her that she would be charged with test refusal. *MacDonald Shimota v. Comm'r of Public Safety*, No. A14-0618 (Minn. App. 05-04-2015) [unpublished], pet. for rev. denied, (Minn. 07-21-2015).

Brodkorb's Affidavit added [A75]:

15. I did not ever state that she was convicted of DUI. On May 18, 2016, an article appeared on missinginminnesota.com, "Michelle MacDonald recommended for GOP endorsement for MN Supreme Court - again." The article included these statements:

> After MacDonald was endorsed [in 2014], news broke that she was facing criminal charges for suspicion of drunk driving and resisting arrest.
>
> * * *
>
> In September 2014, MacDonald was found not guilty of drunk driving, but was found guilty of refusing to submit to breath testing, obstructing the legal process and speeding. A copy of the article is annexed hereto as Exhibit "D" and incorporated herein by reference as if fully set forth hereat.

MacDonald made no response to those specific facts, including Brodkorb's express testimony that he "did not ever state that she was convicted of DUI."[2]

[2]MacDonald claims, in her brief, that her unverified complaint's reference to a February 16 tweet creates a genuine fact issue, and she included in her addendum a purported copy of this tweet. That tweet however is not part of the record on appeal as it was never presented to the

Once the moving party comes forward with evidence supporting a motion for summary judgement, the moving party must "present specific facts showing that there is a genuine issue for trial." *DHL, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). MacDonald presented no contrary facts, and she is not entitled to rely on conclusory statements in her complaint to create a genuine issue of fact.

Person of Interest. Brodkorb reported that MacDonald was a person of interest in a case involving the disappearance of two children. His reporting, as set forth in his affidavit (¶4-9), was based on other news reports and on information supplied to him by Lakeville Police investigators:

> 4. The Amended Complaint (¶¶56-57) alleges that on October 22, 2015, I falsely reported to several persons that Plaintiff was a "person of interest" in a case involving the disappearance of two missing girls. The statements, which I did make, referred to the 2013 disappearance of two daughters of Plaintiff's client, Sandra Grazzini-Rucki. Plaintiff had been noted as a "person of interest" in an April 2015, article by Brandon Stahl, published in the Star Tribune. The phrase was repeated in subsequent Star Tribune articles by Stahl and by Karen Zamora (July 29, 2016).
>
> 5. Beginning on January 8, 2013, Plaintiff represented Sandra Grazzini-Rucki in a Dakota County child custody case. Three prior attorneys had withdrawn from representing her. On April 19, 2013, Ms. Grazzini-Rucki defied the Court's custody orders and secreted two daughters for 944 days.
>
> 6. Subsequently, Grazzini-Rucki and three of her co-conspirators (Dede Evavold, Gina Dahlen and Douglas Dahlen) have been convicted of

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district court, and it is presently the subject of a motion to strike. MacDonald also submitted an affidavit in which she repeated the Complaint's statement but failed to present a copy of the alleged tweet. [App. Add. A.] Moreover, the purported tweet does not even purport to be Brodkorb's. It presents itself as a copy of a tweet by someone else forwarded by Brodkorb to MacDonald.

multiple counts of felony deprivation of parental rights.

7. Lakeville Police investigators had confirmed to me, on multiple occasions, that plaintiff was a "person of interest" in the investigation, based on their belief that she was involved and that she knew what was going on.

8. In ¶61 of the Amended Complaint, Plaintiff alleges that, on or about August 3, 2016, I made the "false statement" that she was a "person of interest" on the website, www.MissinginMinnesota.com, stating that I - not the police - had so labeled her, and that she threatened to sue me if I did not cease and desist. In fact, the article accurately states, "MacDonald was labeled as a 'person of interest' by the Lakeville Police Department in the disappearance of Samantha and Gianna Rucki." A copy of the August 3 article is annexed hereto as Exhibit "B" and incorporated herein by reference as if fully set forth hereat.

9. At all relevant times, I reasonably believed that Plaintiff was a person of interest in the disappearance of the children, and the Lakeville police so labeled her. In fact, she was a person of interest in that investigation.

MacDonald's affidavit did not respond directly to these facts, but it did repeat the hearsay assertion from her complaint that the Lakeville Police "confirmed that she was not a person of interest." The district court properly ruled that this statement did not create a genuine issue of material fact because it was hearsay and not in admissible form as required by Rule 56.05. [APP. ADD A.19-20].

IV. MACDONALD WAS NOT DENIED DUE PROCESS AS TO HER CLAIM FOR DEFAMATION BY IMPLICATION BECAUSE SHE HAD A FULL AND FAIR OPPORTUNITY TO BE HEARD ON THE SUMMARY JUDGMENT MOTION

Appellant's Brief (p. 33-44) makes the claim, previously addressed above, that granting summary judgment without requiring an answer and discovery denied her due process. No case authority supports this assertion. Appellant's Brief goes on at length about the elements of a defamation by implication claim where the plaintiff is not a public figure. However, the Brief concedes (p. 36) that:

> [W]hile the Minnesota Supreme Court found that defamation by implication is not recognized in cases involving public officials, Ms. MacDonald was not a public official, nor did she have the opportunity to present the defamation as alleged in her complaint, or show the malice if it was in fact required.

The Minnesota Supreme Court decision, *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990), holds that defamation does not apply to public official defamation cases. MacDonald suggests, without authority, that she was not a "public official." As discussed above, candidates for public office are treated, for defamation purposes, like public officials. *Monitor Patriot Co. v. Roy*, *supra*, 91 S.Ct. At 625 (1971). Whether she is categorized as a "public figure' or candidate for public office, she is subject to the same public scrutiny and actual constitutional malice is required. As was further discussed hereinabove, there is no basis for MacDonald's assertion that she did not have an opportunity to present her case on the summary judgment motion.

MacDonald was entitled to ask that the court defer considering the motion, allow her time to take discovery, or issue any other appropriate order if she felt she was unable to present essential facts in opposition to the motion, Rule 56.04. A party who fails to take advantage of the procedures available, particularly the right to seek a continuance, cannot later claim to have been deprived of due process. *Slaven v. Engstrom*, 848 F.Supp 2d 994, 1006 (D. Minn. 2012) aff'd, 710 F.3d 772 (8th Cir. 2013).

Appellant's Brief (p. 41) suggests that it is arguing about privilege because the district court brought it up:

> Appellant would challenge the court's determination that there was a privilege. In fact, it was the court that brought up the privilege due to its view of the case, which this Court must reverse. The privilege or "public interest" does not give individuals or organizations the license to defame...

Appellant's Brief gives no indication of where in its order the court "brought up the privilege." A search of the order does not indicate that the court ever used the words "privilege" or "public interest." The court did not rely on privilege in reaching its decision, and this section of Appellant's Brief is irrelevant to any issue on appeal.

Appellant's Brief (p. 34-35) criticizes the court for relying on *Klaus v. Minn. State Ethics Comm'n*, 244 N.W.2d 672, 676 (Minn. 1976) and *Diesen v. Hessburg*, 455 N.W.2d 446, 448 (Minn. 1990), cert. Denied 498 U.S. 1119. However, the brief offers no contrary authority. In fact, both public figures and public officers are subject to the actual malice standard in defamation cases. *LaDoux v. Northwest Pub. Inc*., 521 N.W.2d 59 (Minn. App.

1994).[3] ["A state court cannot award damages to a public official or public figure for defamation unless the plaintiff proves actual malice." *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964) (public official); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975 1991, 18 L.Ed.2d 1094 (1967) (public figure)].

CONCLUSION

Based on the arguments and authorities presented herein, Respondent requests that this Court affirm the decision of the district court in all respects.

Dated: September 17, 2019

Respectfully submitted,

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[3]The brief also suggests (p. 36) that the court's ruling "in no way explains the dismissal of the defamation claim as to Plaintiff MacDonald Law Firm, LLC. This claim is unsupported by any authority and it is unexplained. MacDonald's complaint does not allege any law firm claims separate and distinct from Ms. MacDonald"s. MacDonald did not raise the claim below. In any event, the finding that Ms. MacDonald personally has no defamation claim necessarily defeats any derivative claim by her LLC.